

May 14, 2001

James J. Slack
Field Supervisor
South Florida Ecological Services Office
U.S. Fish and Wildlife Service
1339 20th Street
Vero Beach, Florida 32961-2676

Re: Notice of Availability of Interim Strategy on Section 7 Consultations Under the Endangered Species Act for Watercraft Access Projects in Florida That May Indirectly Affect the West Indian Manatee

Dear Mr. Slack:

By way of introduction, the Office of Advocacy of the U.S. Small Business Administration (SBA) was established by Congress under Pub. L. No. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is also required by the Regulatory Flexibility Act (RFA) to monitor agency compliance with the RFA. 5 U.S.C. § 612. The Chief Counsel of Advocacy is authorized to appear as *amicus curiae* in regulatory appeals from final agency actions, and is allowed to present views with respect to compliance with the RFA, the adequacy of the rulemaking record with respect to small entities, and the effect of the rule on small entities. Id.

On Wednesday, March 14, 2001, the Fish and Wildlife Service (FWS) published a Notice of Availability of Interim Strategy on Section 7 Consultations Under the Endangered Species Act for Watercraft Access Projects in Florida That May Indirectly Affect the West Indian Manatee. 66 Fed. Reg. 14924 (2001). The strategy reflects FWS's findings on:

- 1) the conditions under which FWS could determine that a proposed watercraft access facility is unlikely to have adverse indirect effects on manatees; and
- 2) measures that an individual seeking permission to build a watercraft access facility could take to reduce indirect effects on manatees to an unlikely to occur level.

Watercraft access facilities include slip ramps, launches, dry storage facilities, docks, moorings, marina developments, and similar structures.

Background

The Federal government started protecting the West Indian manatee by listing it as an endangered species in 1967 pursuant to the Endangered Species Preservation Act of 1966. It has continued to be listed through the Endangered Species Conservation Act of 1969 and the Endangered Species Act of 1973, as amended (ESA). The Federal government provided additional protection by promulgating the Marine Mammal Protection Act (MMPA) of 1972. Id. at 14925.

Watercraft-related manatee mortalities have increased since collection of manatee mortality data began in 1974. Id. There are more than 830,000 vessels registered by the State of Florida and an estimated 400,000 out-of-state vessels. More than 1-million watercraft use Florida's waterways and the popularity of watercraft recreation continues to grow. Id. at 14927

When manatees detect the presence of an oncoming watercraft, they swim rapidly to attempt to get out of its path. Their ability to elude oncoming watercraft is largely determined by the speed of the approaching watercraft. Given enough time, manatees are able to avoid lethal or injurious encounters with watercraft vessels. Since slow moving watercraft vessels are less of a threat to manatees, there are watercraft speed zones in some coastal Florida counties with high manatee-watercraft collision rates. Id.

Watercraft operator compliance with speed zones, however, is inadequate to prevent manatee deaths. Studies indicate that compliance rates range from 50.9 percent to 78.65 percent. One study concluded that low levels of enforcement, few citations issued, and poor signage were responsible for poor compliance. Others indicate that lack of law enforcement officers on the water contributed to low compliance. Id.

FWS asserts that addition of new watercraft into Florida's waters has the potential to adversely affect manatees. To address the problem FWS is preparing regulations regarding the circumstances under which the incidental take of manatees associated with watercraft access facilities may be authorized.

The Proposed Strategy

Under the proposal, conservation measures must be included in the project description and be implemented in the area which FWS believes, based on the best scientific and commercial data available, is likely to be affected by the proposed watercraft access project. Conservation measures include: 1) an agreement with a law enforcement entity that has the authority to provide law enforcement; 2) providing funds for law enforcement; or, 3) implementing an activity that would accomplish the goal of conservation. Id. at 14929.

FWS will examine the project description to determine whether the conservation measures are sufficient to reduce watercraft collisions. Prior to a permit being issued, FWS must determine that: 1) there are adequate speed zones; 2) adequate signs to ensure that boaters are aware of the speed zones; 3) speed zone enforcement is, or will be, sufficient to prevent collisions with manatees as a result of the project; and 4) the measures will be in place prior to the project implementation. Id. at 14928

In addition, a financial contribution may be necessary to obtain a permit. With respect to single family docks, FWS may find that a financial contribution to an organization or entity that funds manatee conservation is consistent with the principles of the guidelines. Id. For commercial watercraft access projects and multi-family projects, the strategy requires contributions to be made and on-the-water enforcement assured prior to new watercraft being added to the environment. Id. at 14929. The size and location of the dock will determine the amount of the contribution. For example, a two-slip family dock in a high-risk county would require a contribution to the National Fish and Wildlife Federation (NFWF) in the amount of \$1040 (\$520 per slip) plus administrative costs.¹ A dock with more slips would require a larger donation. Likewise, a dock in a lower risk area would require a smaller donation.

FWS asserts that the purpose of the proposed strategy is to provide assistance in determining appropriate measures for eliminating any project-related adverse effects from watercraft collisions to manatees. It contends that the strategy will guide FWS in evaluating requests for letters of concurrence, requests for initiation of consultation, and during formal consultation to identify measures that eliminate the risk of incidental take of manatees. More specifically, one purpose of this guidance document is to set forth the conditions under which the Service could make a determination that an incidental take, as a result of watercraft collisions, is unlikely to occur so that particular project could proceed prior to the issuance of MMPA rules. Id.

The Proposed Strategy Fails to Address the Stated Problem

The Office of Advocacy asserts that the proposed strategy will have little effect on the mortality rate of the manatee. The only effect that such a strategy may have is that it may decrease the number of facilities that are built. It may, therefore, have a negative impact on the construction of docks and the companies that build those docks. Has FWS considered the impact on water facility access builders? If FWS has this information, it should publish the information so that the public can provide meaningful comments.

Moreover, arguably, fewer docks may actually increase the harm to the manatee. More docks may force speed boaters to slow down in shallow water in order to navigate around the structures. Thus, giving the manatees additional time to clear the areas.

¹ Fish and Wildlife Service, Guidance to Single Family Dock Applications on Contributions to NFWF to Implement Manatee Conservation Measures, p.2 (March 30, 2001).

Moreover, the strategy does not address the “crime”. Manatees are dying because of collision with watercraft vessels, not watercraft facilities such as docks. By FWS’s own admission, the increased manatee speed zone enforcement is the primary conservation measure for reducing manatee mortalities. Id. 14926. The proposed strategy is tantamount to requiring garage builders to pay for law enforcement because there is speeding on Federal highways.

The impact of the proposed strategy is indirect at best. A more direct solution to the problem is to increase enforcement measures and the cost of fines associated with citations for excessive speed. Increasing the number of citations issued and the amount of the fines should pay for the additional law enforcement efforts, signs, and boater education needed to protect the manatee. An increase in citations and fines may act as a deterrent to exceeding the speed limit in areas where manatees are at risk. Furthermore, by increasing citations and fines, the perpetrator is being punished, not the small business that merely builds the facility or the small business that wants to start or expand its boat rental business.

Another possible alternative to this problem may be to require a special permit to operate a boat in the selected areas. Temporary or day permits could be required for renting a boat. In addition to a fee, people seeking permits could be required to read a handout on the manatee and safe boating. The handout could also provide information on the magnitude of the fines for exceeding the speed limit or driving in a manner that may endanger the manatee. Such a strategy would provide additional income to pay for additional law enforcement as well as educate the public, many of whom (i.e. vacationers) may not be aware of the hazards that boaters cause for the manatees.

Those are just a few possible alternatives that may address the problem of protecting the manatee in a more constructive manner. Advocacy implores FWS to consider other creative solutions besides the strategy that it has proposed. The proposed strategy will leave the manatee at risk and possibly force small dock builders out of business.

Advocacy realizes that this is not a proposed rulemaking that is subject to the RFA. If it were, FWS would be required to consider the economic impact of this rulemaking on small entities such as dock builders and consider other alternatives. See 5 U.S.C. §§ 601et seq. However, good public policy mandates that agencies consider viable solutions to the stated problem. In this instance, considering other alternatives may not only save small businesses, it may save the manatees as well.

Thank you for the opportunity to comment on the notice of interim strategy. If you have any questions, please feel free to contact this office at (202) 205-6943.

Sincerely,

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